

Exhibit 23

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 In Re:
4 LEHMAN BROTHERS HOLDINGS INC.,
5 et al.,
6 Debtors.

7 Chapter 11
8 CASE NO.: 08-13555 (JMP)
9 (Jointly Administered)
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10 125 Broad Street
11 New York, New York

12 September 12, 2013
13 9:21 a.m.

14
15 VIDEOTAPED DEPOSITION of RICHARD
16 MILLETT, before Melissa Gilmore, a Notary
17 Public of the State of New York.
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21
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23 ELLEN GRAUER COURT REPORTING CO. LLC
24 126 East 56th Street, Fifth Floor
25 New York, New York 10022
212-750-6434
REF: 104785

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2 Q. Do you agree that?

3 A. Yes. Interestingly, just picking
4 up, he says, at the end, which actually harks
5 back to a point I made before, "It is this
6 feature which leads to the person giving the
7 indemnity to be described as a surety,
8 although, strictly, the contract of indemnity
9 cannot, itself, be a contract of suretyship."

10 MR. ISAKOFF: She couldn't take it
11 down that fast.

12 A. I'm so sorry.

13 The words he uses, "It is this
14 feature which leads to the person giving the
15 indemnity to be described as a 'surety,'
16 although, strictly, the contract of indemnity
17 cannot itself be a contract of suretyship."

18 That is really what I was referring
19 to earlier when I was referring to the word
20 "suretyship" and its use.

21 Q. Do you agree with Sir William
22 Blackburne's conclusion in the Vossloh decision
23 that an essential feature of an indemnity is
24 that the indemnitor has a primary liability?

25 A. Yes.

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2 Q. And what is a primary liability?

3 A. He is liable for the performance of
4 the obligation in question, regardless of
5 whether somebody else is liable or not.

6 Q. And that's also referred to as a
7 primary obligation; is that correct?

8 A. Yes.

9 Q. And would you agree that the
10 distinction between a primary obligation and a
11 secondary obligation is critical to determining
12 whether a contract is one of indemnity or
13 guarantee?

14 A. Can I just back -- go back a little
15 bit? I may have skated over perhaps what could
16 be a subtle difference.

17 We speak of obligations. We speak
18 of liabilities. In reality, what happens is
19 that parties assume obligations. They don't
20 necessarily assume liabilities. They assume
21 liabilities for the performance of that
22 obligation, and liabilities, whatever they are
23 in law, where those obligations are not
24 performed.

25 The word that he uses is a primary

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2 A. (Perusing.) Yes, I see that.

3 Q. You see that, in section ten of the
4 lease, there is a reference to the surety
5 having a primary obligation in the terms
6 contained in Schedule 4.

7 Do you see that?

8 A. I do. I don't think you have quite
9 phrased it right. You paraphrased it, and not,
10 I think, accurately, I'm afraid.

11 What it says is, "In consideration
12 of this demise having been made at its request,
13 the surety hereby covenants with the landlord,
14 and as a separate covenant with the management
15 company, as a primary obligation, in the terms
16 contained in Schedule 4."

17 That's what it says. I see it says
18 that.

19 Q. Do you think that it's irrelevant
20 that the parties chose to use the words
21 "primary obligation" when referring to Schedule
22 4?

23 A. Well, I doubt that it was
24 irrelevant, because one has to assume that when
25 the parties chose to use the words, they did so

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2 with some kind of purpose in mind.

3 Q. Do you have any explanation for why
4 they used the words "primary obligation"?

5 A. Well, the first question is whether
6 the words "as a primary obligation" in clause
7 ten, which you are showing me, refer to the
8 surety covenanting with the landlord, or
9 whether they refer to the separate covenant
10 with the management company.

11 That ambiguity, to my mind, carries
12 through to paragraph one of Schedule 4 as well.

13 So picking those words, as you have,
14 is very interesting, but I'm not sure -- I
15 personally -- personally not completely clear
16 whether that's describing the covenant with the
17 management company or the covenant with the
18 landlord.

19 Q. Are you saying that you believe that
20 the words "as a primary obligation" are only
21 referring to the covenant with the management
22 company as opposed to the covenant with the
23 landlord?

24 A. No, I'm not going that far. I'm
25 saying that it's arguable, at the very least,

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2 of guarantee or indemnity?

3 MR. ISAKOFF: Object to form.

4 A. I personally would ignore the labels
5 used by the parties unless I really had to have
6 recourse to them. I don't believe you do.

7 I'm also looking at the lease
8 because I believe, and I'm sure I quoted it in
9 my first opinion, there is a provision in the
10 lease which says that you aren't allowed to
11 look at the labels.

12 So, in forming my views, I don't
13 look at the labels, but it is right to say that
14 when I address Mr. Rabinowitz's opinions,
15 because he did look at the labels, I had to
16 form a view about them.

17 Q. Well, beyond the label of paragraph
18 one, you recognize, do you not, that paragraph
19 one repeatedly uses the word "indemnify" or
20 "indemnified," correct?

21 A. Well, paragraph one uses the word
22 "indemnify" and "keep indemnified." You say
23 repeatedly. We can read it. It uses it seven
24 lines down.

25 Q. Yes. Okay. So the fact of the use

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2 of the word "indemnify" and "indemnified,"
3 would you agree with me that that's relevant,
4 but not dispositive, in considering whether a
5 contract is one of indemnity versus guarantee?

6 MR. ISAKOFF: Object to form.

7 A. Yes. I mean, I can't sit here and
8 say that it's utterly irrelevant to the
9 question before an English court was, what is
10 Schedule 4 as a matter of its true
11 characteristics, properly interpreted,
12 nobody -- of course, you would look at all the
13 words, and included in the words are the words
14 "shall indemnify and keep indemnified." I'm
15 not going to pretend it's irrelevant.

16 Q. Use of those words would tend to
17 support an argument that the contract is one of
18 indemnity, but, in your view, you would need to
19 look at all the rest of the words in context,
20 correct?

21 A. No, I don't think it tends to
22 support the argument one way or the other.
23 There is part -- hang on.

24 Q. I apologize. I saw you were
25 continuing, so I stopped.

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2 works and what the words "indemnify" and "keep
3 indemnified" mean.

4 Q. And is it your view that the words
5 being used in Schedule 4 are not referring to
6 an obligation that is being given by way of
7 security for the performance of an obligation
8 by another?

9 MR. ISAKOFF: Object to form.

10 A. I do not believe that the words "the
11 surety shall indemnify and keep indemnified the
12 landlord and the management company," are -- et
13 cetera, are words which -- or under which
14 security is being provided for the performance
15 of an obligation.

16 My opinion is that paragraph one is
17 a single composite obligation, and that the
18 second element of it, following the words "and
19 the surety shall indemnify" are descriptors,
20 they describe the extent of the surety's
21 obligation to make payment, which is imposed
22 upon him or it under the first part of
23 paragraph one.

24 Q. If I could ask you to take a look at
25 paragraph one of Schedule 4, which is marked as

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2 It can actually be used as "or." It can also
3 be used, and is very commonly used, as a
4 serializing particle.

5 Q. In either one of those three
6 different possibilities, conjunctive,
7 disjunctive or serial, there are multiple
8 items, at least two, correct?

9 MR. ISAKOFF: Object to form.

10 A. I think the use of the word "and"
11 isn't going to get you anywhere. You've got to
12 look at what's being connected.

13 Q. That's my question. What's being
14 connected?

15 MR. ISAKOFF: Object to form, asked
16 and answered.

17 Q. What's being connected with that
18 word "and"?

19 A. What's your question?

20 Q. What are the two things or more that
21 are being connected by the word "and" on the
22 sixth line of paragraph one of Schedule 4?

23 MR. ISAKOFF: Object to form and
24 asked and answered.

25 A. What's being connected is the

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2 assumption of obligation with the promise, as
3 it were, as to the extent and manner of
4 performance of that obligation.

5 Wash the car and don't use the red
6 soap.

7 Q. So let's take those two pieces. You
8 said the first is the assumption of the
9 obligation.

10 What words in paragraph one are the
11 assumption of obligation?

12 A. The surety hereby covenants. These
13 are the operative words of assumption of
14 obligation.

15 Q. I'm sorry. Are you saying that the
16 words "the surety hereby covenants" all the way
17 up to the word "specified" before and or --

18 A. It's a slightly sort of an arid
19 question. I'm sorry to be too critical.

20 But what's the word in that clause
21 that imposes the obligation on the surety?
22 Well, it's his promise, and that's the word
23 "covenant," but what he's covenanting to do is
24 the whole of it.

25 Q. All of it up to the word

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2 MR. ISAKOFF: Objection.

3 MR. DE LEEUW: I will restate it,
4 because either it got mistranscribed or I
5 misstated it, so I will say it again.

6 A. It sounded like that Groucho Marx
7 thing from Night at the Opera, party of the
8 first party saying do your best.

9 Q. Is there any provision in Schedule 4
10 or the lease that specifies that what you have
11 circled as the second part of paragraph one of
12 Schedule 4 can only be read as the extent and
13 manner of performance of the first part of
14 paragraph one of Schedule 4?

15 MR. ISAKOFF: Object to form.

16 A. There are no express words in
17 paragraph one or Schedule 4 or to the extent
18 that I have reread it again, which is not much,
19 the lease, which tells you that you have to
20 read paragraph one in the way that I believe it
21 should be read. But to finish the answer, that
22 takes you nowhere.

23 In order to characterize a
24 commercial document, you don't look for --
25 you're not going to start by looking at express

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2 provisions where the parties tell you how to
3 read it. If the parties were going to do that,
4 they would have that in the definitions clause.

5 MR. ISAKOFF: Are you ready for a
6 break? We have been going for about an
7 hour and 20 minutes.

8 THE WITNESS: Sure.

9 MR. DE LEEUW: That's fine. Why
10 don't we take lunch now.

11 THE VIDEOGRAPHER: We are now off
12 the record at 12:37 p.m., September 12,
13 2013.

14 (Luncheon recess taken at
15 12:37 p.m.)

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